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June 15, 2001

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Access Charge Reform, CC Docket 96-98; Petitions of AT&T Corp. and Sprint Communications Company for Declaratory Ruling, CCB/CPD 01-02

Dear Ms. Salas:

Pursuant to Section 1.1206 of the Commission's rules, enclosed please find four copies of a June 15, 2001 letter and attachment from David A. Konuch, Kelley, Drye & Warren, to Dorothy T. Attwood, Chief, Common Carrier Bureau, Federal Communications Commission for inclusion in the record of the above-captioned dockets.

Please contact me at (202) 955-9871 if you have any questions regarding this filing.

Sincerely,

David A. Konuch

No. of Copies rec'd 0+4
List A B C D E

Enclosures

cc: Dorothy Attwood
Alex Starr
A.J. DeLaurentis
James Bendernagel (Counsel for AT&T)
Frank Krogh (Counsel for Sprint)

DC01/KONUD/152236.1

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June 15, 2001

EX PARTE
VIA COURIER AND FACSIMILE

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Access Charge Reform, CC Docket 96-98; Petitions of AT&T Corp. and Sprint Communications Company for Declaratory Ruling, CCB/CPD 01-02

Dear Dorothy:

Enclosed is a copy of the Plaintiffs' brief that we filed yesterday in *Advamtel et al v. AT&T Corp.*, CA No. 00-643-A, currently pending before Judge Ellis in the United States District Court for the Eastern District of Virginia. The brief responds to allegations contained in AT&T's June 13, 2001 reply brief to Judge Ellis concerning the effect of recent Federal Communications Commission actions on the resolution of the federal district court lawsuits in which we are seeking to compel payment of access charges withheld by AT&T and Sprint and owed to 14 Competitive Local Exchange Carriers.

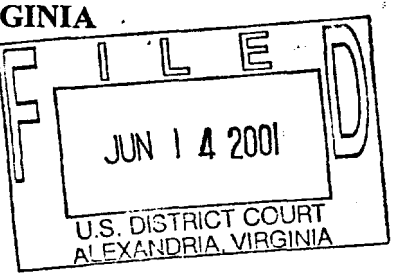
Sincerely,

David A. Konuch
Counsel for Plaintiffs

cc: Alex Starr
A.J. DeLaurentis
Jeffrey Dygert
Glenn Reynolds
James Bendernagel (AT&T)
Frank Krogh (Sprint)

DC01/KONUD/152238.1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division



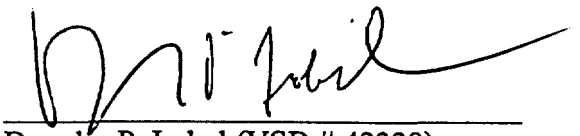
ADVAMTEL, LLC *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 00-643-A**
AT&T CORP.,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR LEAVE TO FILE REBUTTAL TO AT&T'S REPLY TO PLAINTIFFS' RESPONSE TO THE COURT'S ORDER OF JUNE 4, 2001

Plaintiffs hereby move this Court, pursuant to Local Rule 7, for leave to file the attached Rebuttal to AT&T's Reply to Plaintiffs' Response to the Court's Order of June 4, 2001. In support of their Motion, Plaintiffs state as follows:

On June 13, 2001, AT&T filed a Reply Brief in which AT&T accused Plaintiffs of making "false representations" and "claims [that] are groundless." AT&T's allegations are untrue. In addition, AT&T's Reply Brief contains statements about the FCC's decisions that are false and misleading. As a result, Plaintiffs request an opportunity to correct the record, and request leave to file the Rebuttal Brief attached as Exhibit 1 hereto.

Respectfully submitted,



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Dated: June 14, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have, this 14th day of June 2001, served Plaintiffs' Motion For Leave To File Rebuttal, and supporting papers, by causing a copy to be delivered by facsimile to

James Bendernagel, Esq.
SIDLEY & AUSTIN
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Washington, D.C. 20006

Counsel for AT&T Corp.

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One James Center
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Richmond, Virginia 23219

Counsel for Sprint Communications Company, L.P.

Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

ADVAMTEL, LLC *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 00-643-A**
AT&T CORP.,	)	
Defendant.	)	

PLAINTIFFS' REBUTTAL TO AT&T'S JUNE 13 REPLY

INTRODUCTION

AT&T claims that the Plaintiffs, in their June 8th filing to this Court, "misrepresented" the Federal Communications Commission's conclusions contained in its *CLEC Access Charge Order*.[1] As explained more fully below, even a cursory reading of the *CLEC Access Charge Order*, which was appended to Plaintiffs' June 8th brief, demonstrates that AT&T's arguments cannot withstand scrutiny.

At the heart of this case is the issue of what to do when IXCs and LECs disagree as to what a reasonable rate for service should be. Plaintiffs' position in this case has been clear from day one: Defendants were required to pay for service that they used at the lawfully tariffed rate. If Defendants did not like the rate, their proper remedy was to challenge the rates at the FCC. The FCC confirmed this position in its recent *CLEC Access Charge Order*. In a last-ditch attempt to divert the Court's attention from this fact, Defendants accuse the Plaintiffs of

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[1] *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket 96-262, Seventh Report and Order and (continued...)

misrepresenting the FCC's words. However, it is the Defendants and not Plaintiffs that have misread and misinterpreted the *CLEC Access Charge Order* and other recent FCC precedent, as the Court may plainly discern. In addition to extensively quoting from the *CLEC Access Charge Order,* Plaintiffs appended a copy of the Order to their June 8th brief – and the language of that order speaks for itself. The *CLEC Access Charge Order* presents a clear exposition of the law, is plain on its face, and supports Plaintiffs' position.

DISCUSSION

Plaintiffs have contended from day one that under the file tariff doctrine their rates were presumed reasonable, and unless and until the FCC found otherwise Defendants had to pay those rates. *See* Second Amended Complaint (July 28, 2000) at ¶ 30 ("Under the Communications Act, the rates of 'non-dominant' carriers such as Plaintiffs are presumed reasonable when validly filed in Tariffs, as Plaintiffs' have been"). The *CLEC Access Charge Order* confirmed this is true. It stated that existing law "require[s] IXCs to pay the published rate for tariffed access services, absent an agreement to the contrary or a finding by the *Commission* that the rate is unreasonable." *CLEC Access Charge Order* at ¶ 28. The *Order* also confirmed that AT&T's position – that AT&T could unilaterally cancel service at its whim by sending Plaintiffs a form letter – is incorrect. According to the Commission:

> . . . any solution to the current problem that allows IXCs unilaterally and without restriction to refuse to terminate calls or indiscriminately to pick and choose which traffic they will deliver would result in substantial confusion for consumers, would fundamentally disrupt the workings of the public switched telephone network, and would harm universal service.

(. . .continued)
Further Notice of Proposed Rulemaking, FCC 01-146 (April 27, 2001) ("*CLEC Access Charge Order*").

CLEC Access Charge Order at ¶ 93. Instead, the Commission effectively confirmed the Plaintiffs' position: that AT&T cannot unilaterally decline Plaintiffs' access service, by form letter or otherwise. As the FCC stated: "[w]hen [a] customer attempts to call from and/or to an access line served by a CLEC with presumptively reasonable rates, that request for communications service is a reasonable one that the IXC may not refuse without running afoul of Section 201(a)" of the Act. *Id.* at ¶ 94.[2]

On January 5, 2001, this Court ordered a stay of the instant case pending referral to the FCC, under the primary jurisdiction doctrine, of two specific constructive ordering questions:

> (1) Whether any statutory or regulatory constraints prevent an IXC from declining to order (or canceling a prior order) for a CLEC's access services, and
>
> (2) what steps an IXC must take in order to avoid ordering (or to cancel) a CLEC's access services.

AT&T contends that no ruling by the FCC addresses the constructive ordering issues referred by the Court. As Plaintiffs made clear in their brief, the FCC did not expressly address on a retrospective basis whether AT&T constructively ordered service from Plaintiffs in this case. Nevertheless, the FCC did make conclusive statements of the law that provide this Court with all the guidance it needs to conclude that AT&T did constructively order service.

Specifically, the FCC found that it is unlawful for AT&T to refuse to take lawfully tariffed and *presumptively reasonably* priced access service. *Id.* at ¶ 94. This addresses

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[2] The one exception to this rule would be if the Defendants used, in good faith, the process for terminating access service relationships set forth in *MGC Communications, Inc. v. AT&T Corp.*, 11 FCC Rcd 11647 (Com. Car. Bur.), *aff'd in pertinent part*, FCC 99-408 (rel. Dec. 28, 1999), which requires the two carriers to work together cooperatively to move customers to a new carrier. However, it is undisputed that Defendants never attempted to engage in this process.

the Court's first referred question (as discussed in more detail below). The FCC's conclusion also obviates the second referred question – if blocking lawful traffic is prohibited by Section 201 of the Act, there are no steps an IXC can take to avoid traffic. As AT&T's counsel admitted to this Court, a finding that Section 201 prevents AT&T from canceling or refusing to accept traffic means that AT&T has no defense to Plaintiff's claims of constructive ordering. *See* Plaintiff's Brief in Response to Court's June 4th Order at 9.

AT&T attempts to argue that the FCC's decision in the *Total Tel* case[3] supports a defense against Plaintiffs' constructive ordering claims, but even a cursory reading of that decision makes clear that it does not. *Total Tel* did not involve a legitimate provider of local exchange telephone service, but rather dealt with a carrier that possessed just a single customer that had created a mechanism to create sham traffic. *Total Tel* at ¶¶ 5, 14. *Total Tel* by its very terms represents too slender a reed to support the substantial weight Defendants place upon it. As the FCC stated explicitly in *Total Tel*:

> Our ruling should not be construed to address the broader question of what other circumstances might permit an IXC to refuse to purchase, or discontinue purchasing, access service from a competitive LEC. That is an issue about which the Commission has previously sought comment, and it is currently under consideration.

Total Tel at ¶ 21 n. 50. *Total Tel* then identified CC Docket No. 96-98 – the docket number of the *CLEC Access Charge Order* – as the place where the broader issue was being considered by the FCC. *Id.* Thus, once again, the *CLEC Access Charge Order* has answered that question, and

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[3] *Total Telecommunications Service, Inc. and Atlas Telephone Company, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, File No. E-97-003, FCC 01-84 (rel. March 13, 2001) ("*Total Tel*").

the law is the opposite of what AT&T says it is: AT&T cannot refuse to order or decline the service from a CLEC that is not a sham provider.[4]

In sum, the state of the law has now been clearly stated by the FCC:

- AT&T (or any carrier) is prohibited by Section 201 of the Communications Act, from refusing to accept or pass along traffic that is lawful, and priced at a presumptively or conclusively reasonable level. *See CLEC Access Charge Order* at ¶¶ 28, 94.

- Under Section 204 of the Act, tariffed rates are presumed lawful[5] as soon as the tariff takes effect, and remain lawful unless:

-
- the FCC conducts a rulemaking proceeding of general applicability under Sections 201 202, etc. of the Act, and
  - prescribes new, conclusively reasonable rates[6] on a going-forward basis per its prescription authority under Section 205, or
- the FCC conducts a party-specific complaint under Section 208, and
  - prescribes new, conclusively reasonable rates under Section 205, or
  - makes a factual determination that the traffic is a sham, as it did in *Total Tel*

Applying this law to the facts of the instant case enables the Court to conclude the following:

- AT&T is prohibited from refusing any CLEC traffic that is priced at 2.5¢ or lower, starting June 20, 2001, and going forward. Such rates are conclusively lawful, and cannot be challenged by AT&T in a formal complaint.

- AT&T is prohibited from refusing any CLEC traffic taken prior to June 20, 2001 because, under Section 204 of the Act and the FCC's rules, the tariffed rates are presumed lawful.
  - For BTI, the presumptively lawful rates were challenged by AT&T and Sprint in a formal complaint, and the FCC found that the record allowed a reversal of the presumption of reasonableness, and allowed the FCC to prescribe rates on a retroactive basis.

---

4 AT&T has never even asserted that any of Plaintiffs' traffic is sham traffic, and cannot do so at this late date in the proceeding. Indeed, such an assertion could not be substantiated.

5 A "presumed reasonable" rate is by definition a lawful rate, but may be subject to review by the FCC on its own motion, and may be subject to a complaint by another carrier under Section 208 of the Communications Act.

6 A "conclusively reasonable" rate is one that has specifically been found to be reasonable by the FCC. Such a rate cannot be contested by another party through a Section 208 complaint. *See CLEC Access Charge Order* at ¶ 60.

- At no time, however, could AT&T have refused BTI's traffic:
  - Prior to the FCC's finding, BTI's rates were presumptively lawful under Section 204 of the Act and the FCC's decisions. *See* 47 U.S.C. § 204(a)(3); s*ee also CLEC Access Charge Order* at ¶ 28.
  - Subsequent to the BTI decision, the rates that the FCC prescribed are *conclusively* lawful.
  - In either case, AT&T would have violated Section 201 of the Act if it refused the traffic.

- For the non-BTI Plaintiffs, all tariffed rates are presumptively lawful unless and until the FCC finds to the contrary, either in a party-specific complaint or in a rulemaking of general applicability.

- At all times relevant to this proceeding, all of Plaintiffs' rates were either presumptively or conclusively lawful. As a result, AT&T is prohibited by Section 201 of the Act from refusing the service.

- Because AT&T could not take steps to refuse traffic, it has no defense to a finding that it constructively ordered service from Plaintiffs.

- Because AT&T constructively ordered service from all Plaintiffs,[7] the filed rate doctrine compels a finding that AT&T must pay Plaintiffs for the service it took at the tariffed rates.

This regulatory framework preserves universal service and connectivity goals while at the same time offering a solution where an IXC and a LEC cannot agree on a price. Any other interpretation of the law would allow AT&T to disrupt service to the customers it shares with the CLEC, unless and until the FCC makes an affirmative finding that the traffic is lawfully priced. Such a finding would turn the Communications Act and the filed rate doctrine on their heads: it would eviscerate the presumption of lawfulness in 204 and the FCC's repeated orders, and turn it into a presumption of unlawfulness. It also would eviscerate the filed rate doctrine, making it impossible to enforce. Such an interpretation would also violate Section 201 of the Act by allowing indiscriminate traffic blocking, resulting in the customer confusion, incomplete calls,

[7] As Plaintiffs have demonstrated previously, AT&T submitted actual service requests to a number of Plaintiffs. In these instances, the Court need not conduct a constructive ordering analysis, and should simply order payment of the tariffed rates under the Filed Rate Doctrine.

and profound harm to the Public Switched Network, as the FCC described in its *CLEC Access Charge Order*. *See CLEC Access Charge Order* at 94.

Finally, the legal interpretation argued by AT&T would lead to an irrational result, as shown by the following hypothetical: Suppose AT&T blocked a CLEC's traffic, on the grounds that the rates are unreasonable. The FCC subsequently conducts a Section 208 complaint hearing. The FCC then concludes the hearing five months later, and finds that the rates were reasonable. AT&T would then have blocked traffic that was priced at lawful and reasonable rates, in violation of Section 201 of the Act.

Obviously, the Act cannot work in the way AT&T suggests without the national communications system descending into chaos. Instead – as Plaintiffs have argued consistently from the beginning of this case – the Communications Act follows the orderly scheme outlined by Plaintiffs, and long recognized by the FCC and the courts. Carriers file tariffed rates, which are deemed lawful under Section 204 unless and until the FCC finds otherwise. The filed rate doctrine provides certainty and consistency, and prevents discrimination among carriers buying the same tariffed service. If a carrier believes the rates are excessive, it can file a complaint with the FCC under Section 208, which complaint will be heard and decided by the Commission within five months (pursuant to the FCC's current interpretation of the Telecommunications Act of 1996). *See* 47 U.S. C. § 208(b). If the FCC finds the rates were excessive, it can award a refund of the excessive portion of the rates from the date the complaint is filed. If the FCC can lawfully award retroactive damages – as it contends it can do in the BTI case – then the aggrieved carrier can be awarded a refund, even if it delayed in filing a 208 complaint.[8] Section

[8] As Plaintiffs stated in our prior brief, any reference to the *BTI Rate Case Order* should not be taken as an endorsement of the FCC's ruling in that case. Indeed, the FCC's Order is wrongly decided and is profoundly flawed as a matter of fact and law, and is unlikely (continued...)

201 of the Act prevents carriers from blocking traffic as a means of coercing or punishing other carriers, and assures that service to end users is not interrupted. *See CLEC Access Charge Order* at ¶¶ 23-24, 93-94. The logic of this regulatory scheme is self-evident, which is why it has governed the relations between telecommunications carriers for 60 years. Any conflicting interpretation of this interplay between statute and common law would destroy this carefully-crafted balance, and would lead to enormous disruptions throughout the industry.

In conclusion, although the FCC has not specifically addressed the referred constructive ordering issues on a retrospective basis, the Commission has taken those issues "out of play" by ruling that a carrier may not decline or refuse to purchase telecommunications services provided at presumptively lawful rates. This Court should award payment of the Plaintiffs' lawfully tariffed rates.

(...continued)
to withstand appellate review if challenged in court. *See BTI Rate Case Order* at p. 29 (Dissenting Statement of Commissioner Harold Furchtgott-Roth).

CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that the Court immediately reactivate the instant case, and proceed to trial on the issue of damages.

Respectfully submitted,

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Dated: June 8, 2001

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